In the

Supreme Court of the United States.

October Term, 1899.

THE TELLURIDE POWER TRANSMISSION CO. and T. S. STUNT, Petitioners in Error,

vs.

THE RIO GRANDE WESTERN RAILWAY,

No. 10.

Filed Oct. 13, 1899.

BRIEF FOR DEFENDANT IN ERROR.

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v.

THE RIO GRANDE WESTERN RAILWAY.

No. 70.

BRIEF FOR DEFENDANT IN ERROR.

Reply to the Statement of Facts by the Plaintiffs in Error.

This case has already been presented to the Court on our motion to dismiss or affirm, which remains undecided.

The suit was brought in the District Court of the Fourth Judicial District of Utah, by the Rio Grande Western Railway Company, a corporation of the State of Utah, plaintiff (now defendant in error), against The Telluride Power Transmission Company, L. L. Nunn

(now plaintiffs in error), and L. Holbrook, defendants. The object of the suit was to confirm and quiet the plaintiff's title to a strip of unsurveyed public land in Provo Cañon two hundred feet in width and upwards of eighty rods in length, and to secure an injunction restraining the defendants from continuing to assert rights therein adverse to those of the plaintiff. Upon this land the plaintiff claimed the right to construct and maintain part of one of its lines of railway. After hearing on the pleadings and evidence, the District Court entered a decree in which it granted the plaintiff the relief prayed, in the bill of complaint. On appeal by two of the defendants, the Telluride Co. and Nunn, the Supreme Court of Utah affirmed the decree of the District Court, whereupon the same defendants sued out this writ of error.

In brief the contentions now made by the defendants are these: (1) That they had acquired vested rights in the land in dispute, prior to the plaintiff's location of its line; (2) That the plaintiff was not authorized to and did not acquire the rights claimed by it; (3) That the cause should have been removed to the Circuit Court of the United States. The facts pertinent to these questions are as follows:

(I.)

It is asserted that the defendants, by their answer, had set up a right to the land in controversy, claiming that it had been acquired by virtue of an authority exercised by them under Sec. 2339 R. S. U. S. and that this right was adverse to that set up by the plaintiff.

The answer alleged this and nothing more:

That the greater part of the bed of Provo Cañon was unsurveyed public land; that the defendants had surveyed some lines of contour, which encircled considerable tracts of land in the cañon, before the plaintiff began the

actual construction of its roadbed; that the defendants had posted notices and cut brush and done similar superficial work in various places; and that they had constructed a flume to be used in connection with a small dam to be erected at a point a third of a mile below the land in dispute; also that all of this work was incident to the building of certain other dams which the defendants proposed to construct at other points, and that the defendants proposed to store vast quantities of water to be used in the development of electrical power, in irrigation, in mining, and in other enterprises; and that the dams which they proposed to build, with their appurtenances, would cause the overflow of, or would otherwise occupy the greater part of the cañon, including the land in dispute.

By reason of these alleged acts and intentions the defendants asserted that they had acquired a right to the possession of the whole bed of the cañon, or so much thereof as they might in future see fit to occupy, and that they had a right to exclude the plaintiff from the land in dispute and all other land encircled by their contour lines.

The Court will seek in vain for any allegation of the answer or for any other statement of record wherein the defendants "specially set up, or claimed" that they had acquired any right or title to the land in controversy under Sec. 2339 R. S. U. S., or pursuant to an authority exercised thereunder. The first specific claim of such a right was set up in their petition for this writ of error (p. 340).

The defendants say that during the years 1894 to 1896, they did certain work in Provo Cañon. They speak of it as if all of it had been done with a view to the construction of one particular dam and reservoir which would cause the overflow of the land in question. The history

of the transactions of the defendants and the plaintiff in Provo Cañon is this: In October of 1894, one Holbrook posted a notice near the river at a point called Bridal Veil Falls, upwards of a mile below the land in question. This notice stated in a general way that the subscriber proposed to build a dam at that point (p. 16, Finding 14th). Holbrook, originally a defendant, disclaimed any interest in the controversy. In 1895 the defendants' engineer visited Provo Cañon, and caused some surveys to be made. Certain contour lines were run from Middle Rock upstream. Stakes were driven near Middle Rock about fifteen feet above the level of the river, marked "top of dam." By this and their other actions, the defendants showed that they had determined upon the construction of a small dam at Middle Rock with an appropriate flume and appurtenances. On March 23, 1896, the plaintiff commenced the final location of one of its lines. This was to run from Provo City to a point on the eastern boundary of the State. It was described in the plaintiff's articles of incorporation and had been surveyed (pp. 13–14). The work was started at Provo City and prosecuted diligently. On April 10, 1896, the final location had reached a point in the cañon called Hanging Rock, near the land in controversy. In June, the work of constructing the roadbed along the located line was begun. One change was made in the line, which caused it to traverse the land in dispute. This was not material because all of the land was unsurveyed and was unoccupied. The railroad acted in good faith throughout (pp. 14–15, Findings 5th–10th). Meanwhile the defendants continued their work upon the small dam at Middle Rock. Beside this, they posted several notices from point to point, throughout the length of the cañon and at various levels, by which they claimed all

land below them—that is to say, practically the whole of the cañon (p. 17). As the plaintiff's employees, engaged in the construction of its roadbed, approached Hanging Rock, where the cañon is very narrow, the defendants, without intending to construct a dam or anything else, began cutting brush, setting off blasts, and running contour lines (Record, pp. 17–19, Findings 15th, 21st, and 24th). When the plaintiff's laborers reached Hanging Rock and attempted to proceed with their work, they were confronted by the defendants, a controversy ensued, and their further progress was prevented. Hence this suit.

The findings of fact, herein show that the defendants did not enter Provo Cañon with any definite purpose, but took up and abandoned various enterprises and never appropriated or had possession of the land in dispute. They show that the defendants never did any substantial work looking to the diversion of waters from the Provo River at a point nearer the land in dispute than 1,700 feet. At a place known as Middle Rock, 1,700 feet below this land, the defendants had expended considerable money in the construction of a flume designed to be used in connection with a small dam, which could not cause the overflow of, or in any wise affect the land in dispute, or any part of the plaintiff's roadbed. Elsewhere they had done nothing beyond the posting of notices, the running of two or three disconnected sets of contour lines and the cutting of a little brush, all of which things evidenced no fixed, present, intention to establish any enterprise, and none of which were attended with any considerable expense (pp. 16–20, Findings 15th, 17th, 20th, 21st, 23d, 24th, and 26th).

This case involves the title to but one small tract of land, which, as we have seen, could not have been affected

by any possessory rights, acquired by the defendants through their work done at Middle Rock. Still, the Supreme Court said (p. 339) that the right to construct and maintain a dam in the Provo River, and thereby to overflow lands in the cañon, might be acquired pursuant Sec. 2339 R. S. U. S., and held that the defendants were entitled to retain any rights which had vested in them by virtue of their having appropriated and held possession of land, used or intended to be used in connection with their flume and dam in course of construction at Middle Rock. The court expressly declined to determine the extent to which a person might have acquired proprietary rights in the cañon, pursuant to the statute; but, affirming the findings of the District Court, it found as a fact from a preponderance of the evidence, that the defendants were never in possession of the land in dispute (pp. 339–245). This finding determined the case, absolutely, because the benefits of Sec. 2339, are only extended to those who can show that rights have vested in them through priority of possession.

The decision of the court below did not draw in question the validity of any statute of the United States or the validity of any authority that could have been exercised thereunder, by the defendants. The decree did not forbid the defendants to construct a dam in Provo Cañon, and did not forbid them to retain and use any dam or land or anything else, of which they were possessed.

(2.)

The defendants assert: (*a*) that the plaintiff's charter did not authorize it to build a line through Provo Cañon; (*b*) that the plaintiff had lost some or all of its corporate powers by limitation; and (*c*) that it was not entitled to occupy the unsurveyed public land in dispute for railroad purposes.

These questions were raised in the District and Supreme Courts of Utah. Both courts held that the plaintiff was an existing corporation of that State; that it had authority to build and operate the line in question; and, that it was the owner of the land in dispute, subject to the paramount title of the United States (Record, pp. 13–14, 20, and 334–339).

(*a*) It appears that the plaintiff's charter authorized it to construct and operate several lines of railway in the State of Utah. Two of these were described as beginning at or near the city of Provo, in Utah county, and running thence, through certain counties, to places in the eastern portion of the State. The most direct and only practicable route lay through Provo Cañon (pp. 13–14). The description of the lines contained in the charter was sufficiently explicit. The question rested exclusively within the jurisdiction of the State courts.

(*b*) It appears that the plaintiff was incorporated under the laws of the State of Utah and organized under its articles of incorporation on June 24, 1889 (pp. 13, 333–334). As the grantor of the charter, the legislature and courts of the State of Utah had exclusive jurisdiction over all questions affecting the plantiff's corporate existence and the continuance of the rights delegated to it by its charter.

(*c*) The land in dispute is admittedly unsurveyed public land of the United States. The District Court found that the defendants never held possession of it and that it was unoccupied; that the plaintiff had filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, as required by the act of Congress, approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States,"

and was proceeding to build its road pursuant to an authority, granted thereunder (p. 13). The Supreme Court held (pp. 338–339) that the plaintiff was entitled to occupy and use the land in dispute as it had done and proposed to do, and that the plaintiff was the owner of the land, subject only to the paramount title of the United States. We maintain that it is not competent for any one except the grantor—the United States—to assail the plaintiff's rights or title.

No federal question is presented by the decree of the court below, so far as it relates to the plaintiff's title, because the only statute of the United States drawn in question was the act of March 3, 1875, and the decree was not against the validity of that statute or against the validity of the authority exercised thereunder by the Secretary of the Interior and the plaintiff.

(3.)

The third and last contention of the defendants is that this cause should have been removed to the United States Circuit Court because there was diversity of citizenship of the parties. In their answer, the defendants claimed the right to remove the cause, but did not plead a diversity of citizenship, or any other fact, as the basis of their alleged right. It is now asserted that the trial court erred in refusing to remove the cause to the United States Court, but it is admitted that this question was not presented by the record and was not raised on appeal, in the Supreme Court of Utah. After that court had entered its final decree, the defendants filed in the clerk's office certified copies of certain papers, tending to show that they had attempted to remove the cause, but that the District Court had declined to order its removal. They might also have presented certain other papers, of record in the District Court, but

not included in the record on appeal. These would have shown that the Circuit Court of the United States, to whom they had applied for an order removing the cause, had refused to grant it and had remanded the cause to the State court. It is sufficient, however, that the Supreme Court of the State never saw any of these papers and had no opportunity to pass upon the question. (See Brief in Support of Motion to Dismiss or Affirm, pp. 9–13.)

Argument.

I.

Concerning the Defendant's Claim of Title.

(A.)

So far as it related to the defendants' claim of ownership, the decree of the court below did not involve the construction of any federal statute, or the determination of rights of the defendants acquired pursuant to a federal statute. It was based upon a fact found and is not now open for review.

The defendants say that they were proceeding to divert water from the Provo River, at Hanging Rock, by authority derived from Section 2339 R. S. U. S., when the plaintiff attempted to build its roadbed upon the land in dispute. They say that as an incident to the exercise of this authority, they were entitled to overflow the land in dispute and as much of the bed of the cañon as they pleased. They failed to prove their case.

The judgment or decree of the highest court of a State can be reviewed here, only upon *writ of error.*

§ 209, *R. S. U. S.*

A writ of error "removes nothing for re-examination except the law" applied by the State courts to the facts found. The facts in this case are conclusively established by the findings of the District Court (pp. 13–20) which were approved and adopted by the Supreme Court, in its general judgment of affirmance (p. 333).

Wiscart v. *Dauchy*, 3 *Dall.* 321, 324, 327–330.

In the case of *Hecht* v. *Boughton*, 105 *U. S.*, 235, 236, it was said by Chief Justice Waite:

> "We are not to consider the testimony in any case. Upon writ of error, we are confined to the bill of exceptions, or questions of law, otherwise presented by the record; and upon appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us."

Even in reviewing a cause on *appeal* from the Supreme Court of a Territory this court will not disturb findings made by the district court and sustained by the Supreme Court.

Wasatch Mining Co. v. *Crescent Mining Co.*, 148 *U. S.* 293–296.

Stringfellow v. *Cain*, 99 *U. S.* 610.

Neslin v. *Wells, Fargo & Co.*, 104 *U. S.*, 428.

Eilers v. *Boatman*, 111 *U. S.*, 356.

Idaho & O. Land Improv. Co. v. *Bradbury*, 132 *U. S.*, 509, 513–515.

Mammoth Mining Co. v. *Salt Lake Foundry and Mach. Co.*, 151 *U. S.*, 447, 450.

Bear Lake &c. and Waterworks Co. v. *Garland*, 164 *U. S.*, 1, 18.

The defendants in their petition for writ of error (p. 340) say that they had claimed title to the land in dispute by virtue of an authority exercised by them under § 2339 *R. S. U. S.* This statute provides:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

It is clear that the only way in which an authority can be exercised under the section is by appropriating the flow of water and by taking possession of land actually needed to render the appropriation of the water effective and useful.

The 24th finding of the District Court (p. 20) contains this:

> "The defendants have never taken or had possession of the land in controversy or any land in the cañon except the land on which their flume (at Middle Rock) is erected and perhaps a constructive possession or claim of possession to so much as a dam 15 feet high at Middle Rock would flow."

This is not inconsistent with any other and more specific finding. On the contrary other findings explain and

support it, showing that the defendants had constructed a flume and other accessories of a small dam, intended to be built at Middle Rock, which would not cause the overflow of the land in dispute: also that they had made surveys and posted notices in the cañon, at various points and at different levels, but that these were in no wise connected with one another, or with the work done at Middle Rock: also that the surveys were not made by the defendants with any present intention of building other and larger dams, but with the hope of retaining control of the cañon, awaiting the defendants' future pleasure (pp. 19–20, 339–340).

Therefore the 24th finding is not a conclusion of law but a proper finding of an ultimate fact.

Wiscart v. *Dauchy*, 3 *Dall.* 321, 330.

Eilers v. *Boatman*, 111 *U. S.* 356.

Without possession, and "*priority of possession*," no right can be acquired under § 2339 *R. S. U. S.* The defendants having failed to prove that they had possession of the land, the court below could do nothing but decide that they had no rights in the premises.

In a case quite similar to the one at bar, this Court said:

> "The question thus presented and decided involved no construction of any federal statute nor did it become necessary to determine the rights of the parties under the federal mining statutes."
>
> *Bushnell* v. *Crooke Mining Co.*, 148 *U. S.* 682, 683–690.

The defendants are precluded from asserting that they acquired a right or title pursuant to Sec. 2339 R. S. U. S., because they did not set it up, specifically, in the courts below (*Columbia* W. *P. Co.* v. *Columbia E. S. R. T. Co.*,

172 *U. S.*; *Spies* v. *Illinois*, 123 *U. S.* 131, 181; *Chappell* v. *Bradshaw*, 128 *U. S.* 132 · *Baldwin* v. *Kansas*, 129 *U. S.* 52; *Teeper* v. *Texas*, 139 *U. S.* 462) It would have availed them nothing, had they by answer or otherwise, made the claim, in due course. Their case was wholly dependent upon proof of the fact that they had possession of the land in controversy, before the plaintiff entered upon it. Without such proof no mere formal allegation would have been sufficient to give this court jurisdiction.

In the case of *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87, it was said that "the bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

Again, in *Hamblin* v. *Western Land Co.*, 147 U. S. 531, 532, we find this:

> "A real, and not a fictitious, federal question is essential to the jurisdiction of this court over the judgments of State courts."

(B.)

The posting of notices, running of contour lines, and other things done by the defendants in Provo Cañon, did not constitute the exercise of an authority under Sec. 2339 *R. S. U. S.* (*supra*).

The record shows that Provo Cañon is many miles in length and that it contains many sites available for the diversion of water from the Provo River, by means of

dams, reservoirs and their accessories (pp. 13–14, 16, 17, and 19). The defendants' notices were distributed over a large area and claimed substantially the whole of the cañon and the greater part if not all of the flow of the river. Their contours embraced practically the entire bed of the cañon. It is folly to suppose that they ever had any idea of building all of the dams, which their notices suggested, or that they intended to overflow all of the land within their contours. It is certain that they could not make a profitable use of the vast quantities of water which would be stored in the reservoirs suggested, if indeed the flow of the river had ever been sufficient to fill them (p. 18). The court found (p. 19) that if the defendants ever required an amount of water, or power as great as a dam eighty-five feet in height would store, or produce, such a dam could be built, at Deer Creek, a point in the cañon, five miles above the land in controversy, at one-fourth of the cost of a similar dam at Hanging Rock. A dam at Deer Creek, while equally efficient for the defendants' purposes, would not exclude from the cañon all railroads, wagon roads and other enterprises, public and private (p. 19). Even if the defendants had a right to question the correctness of the findings, which they have not, there can be no doubt that the District and Supreme courts were right when they found (pp. 19–20):

> "23d. The defendants never intended to erect a dam 60 feet high, or to any height, exceeding fifteen feet at the Middle Rock, or in pursuance of the notice dated March 27, 1896, and have done no work indicating such an intention, and the notice was not posted at the place intended by defendant Nunn, or in accordance with his intention, and the survey commenced under said notice was abandoned by the direction of defendant Nunn.

"24th. The defendants have never had a present intention or given any public printed or written notices of an intention to erect a dam to raise the water at Hanging Rock 85 feet, and have never done or pursued with diligence any work to show or give notice of such an intention.

"They intended to divert the water at Middle Rock by a dam not more than 15 feet high, and use the power thus generated, looking to the future success of the enterprise and the future demands for more power, and a dam at Hanging Rock, in the meantime performing such acts as would give them full control of the water and power of the cañon, awaiting the wants and contingencies of the future."

We think the court might have gone still further and said that the defendants set up a claim to the site at Hanging Rock, in preference to the one at Deer Creek, which was more desirable for their purposes, with the intention of levying a heavy toll upon this plaintiff and other railroads, and upon all interests of the people of the adjoining region.

Section 2339 *R. S. U. S.* (*supra*) extends protection to those in whom rights have vested by "*priority of possession.*" It is intended to assist and protect those actually engaged in agriculture, mining, or manufacturing, or who intend to engage in this and other industries, which require and depend upon the use of water. It is not intended to afford a basis for speculation. Before one can properly claim any benefit under the statute, he must, at least, have in contemplation the immediate establishment of some definite enterprise; he must proceed with reasonable diligence to establish his enterprise and put the Government's bounty to a proper use; and he must actually appropriate and promptly take possession of everything that he intends to hold.

Bear Lake & River etc. Co. v. *Garland*, 164 *U. S.*, 11–14.

It is clear that these requirements of the statute were never fulfilled by the defendants, and that they were never in a position to claim any benefit under § 2339 R. S. U. S., so far as the land in controversy is concerned.

(C.)

Appropriations of water and land to be warranted by Sec. 2339 R. S. U. S., must be kept within reasonable limits. They must not be such as to give an individual a monopoly, to the detriment of other interests, public and private. The defendants are claiming such a monopoly.

Though the court found to the contrary, it is asserted by the defendants that the end and aim of their various surveys and work, was the construction of a dam that would raise the water to a height of 85 feet above its actual level, at Hanging Rock.

A dam, 85 feet in height at Hanging Rock, would create a large lake, which would submerge the whole bed of the cañon for several miles and to a great depth. It would give the defendants a monopoly of the water-power available to a large region. It would exclude all railways and highways from the cañon, and thus deprive the inhabitants of Provo and the Utah valley of their only means of reaching places in the eastern part of the State (pp. 14, 18–20).

Such an appropriation by the defendants would be unreasonable and an injustice to the community. Especially is this true in the present case, because there is no present need and no prospect of a future need of as much water or power as an eighty-five foot dam would provide (p. 18, Finding 19th, p. 20, Finding 27th).

These facts were all properly found by the District Court and properly entered into its consideration of the

case. Monopolies are not permitted and no rights can be secured which are not in conformity with local customs, conditions, and needs.

In the case of *Basey* v. *Gallagher*, 20 *Wall.* 677, 685, it was said:

> "Water is diverted to propel machinery in flour mills and sawmills and to irrigate land for cultivation as well as to enable miners to work their mining claims, and in all such cases the right of the first appropriator exercised within reasonable limits is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual."

Atchison v. *Peterson*, 20 *Wall.* 507.
Jennison v. *Kirk*, 98 *U. S.* 453.
Broder v. *Water Co.*, 101 *U. S.* 274, 276.

However, our case is not dependent upon the propriety of these findings and the correctness of the conclusions which the District Court deduced from them. The Supreme Court based its decision upon the fact that the defendants never had possession of the land, and declined to decide whether the defendants' claims were reasonable or not, or to what extent they could have appropriated water from the Provo River or land in Provo Cañon (pp. 339, 340).

II.

Concerning the Plaintiff's Ownership of the Land in Controversy.

(A.)

The existence of the plaintiff as a corporation of the State of Utah, the extent of its powers, and its liability to the forfeiture of some or all of its corporate powers are questions wholly within the jurisdiction of the State and its courts, and are questions which the State alone can raise.

The defendants argue (Brief for Plaintiffs in Error, pp. 20–30), that the plaintiff was not a corporation of Utah in 1896, and was never authorized by its articles of incorporation to construct a line or lines of railway through Provo Cañon. Also that, if it had ever possessed such a right, it would have been forfeited by the plaintiff's failure to perform conditions subsequent prescribed by the statute under which it was incorporated, inasmuch as it did not commence the construction of the line in question within two years, and did not finish all of its lines and put them in full operation within ten years after its incorporation.

These assertions are in direct conflict with the facts. The findings of the District Court show (pp. 13 and 14):

> "1st. That the plaintiff is a railroad corporation organized under and in pursuance of the laws of the State of Colorado and of the Territory of Utah on or about the 9th day of July, 1889, by the consolidation of the Denver and State Line Railway Company, a railroad corporation of the State of Colorado, and the Denver and Rio Grande Western Railway Company, a railroad corporation of the Territory of Utah, and

under an agreement and articles of association for fifty years, containing all the provisions required for railroad corporations by the laws of said State and Territory. Said corporation filed with the Secretary of the Interior at Washington a copy of its articles of incorporation and due proofs of its organization under the same, as required by the act of Congress, chapter 152, approved March 3, 1875, entitled 'An act granting to railroads the right of way through the public lands of the United States.'

"2d. The articles and agreement of incorporation of the plaintiff, among other lines and routes which it was organized to construct and operate, described the lines and routes set forth in the complaint, and the only feasible route for a railroad from a point at or near Provo City by either of the routes specified in the complaint is up Provo river and cañon from the mouth of said cañon (which is about six miles from Provo City in a northeasterly direction), to or near the summit of the Wasatch range of mountains, a distance of about thirty-five miles from the mouth of the cañon, and there is no other practicable route for a railroad through any cañon or pass through the Wasatch range of mountains for a long distance north and south of Provo City and following the general course of the lines and routes named in the complaint."

The Supreme Court held that the plaintiff had complied with all the requirements of the laws of the State, and that it had been guilty of no act of omission which would constitute a ground for the forfeiture of its charter or any of its corporate powers, but was authorized by its charter to construct and operate the line of railway in question (Record, pp. 334–338).

In this respect the decree of the State court is not subject to review.

Nonconnah Turnpike Co. v. *Tennessee, Sup. Ct. Rep.* (24 *L. C. P. Ed.* 368.)

It is a well-established rule that an individual cannot plead by way of defense that a corporation has rendered itself liable to the forfeiture of its charter by failure to perform a condition subsequent.

In the case of *Schulenberg et al* v. *Harriman*, 21 Wall. 44–63, the Court said:

> "It is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor and his heirs or successors, if the grant proceed from an artificial person, and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way, from the Year Books down, and the same doctrine obtains where the grant upon condition proceeds from the Government. No individual can assail the title it (the Government) has conveyed on the ground that the grantee failed to perform the conditions annexed."

Van Wyck v. Knevals, 106 *U. S.* 360, 368–9:

> "The defendant, having failed to establish the validity of his own title, attacks that of the Company to the lands covered by the grant, alleging that the Company never completed the construction of the entire road for which the grant was made; that after filing its map with the Secretary of the Interior, it changed for part of the distance the route of its road, and that it never complied with the conditions of the laws of Nebraska for the extension of its road within the limits of that State. We do not deem these objections, when considered with the facts on which they are based, as having any force. There is to them a ready and conclusive answer. Assuming that the Burlington & Missouri River Railroad, with which the Company's road connected, was not a branch of the Union Pacific Railroad and that there-

fore the Company's proposed road was not entirely completed, the fact remains that the Company constructed a portion of the proposed road and that portion was accepted as completed in the manner required by the act of Congress. Patents for some adjoining sections were accordingly issued to the Company and a right to all of them not specially reserved by the condition of the grant vested in it. So far as that portion of the road which was completed and accepted is concerned, the contract was executed, and as to the lands patented, the transaction on the part of the Government was closed and the title of the Company perfected. The right of the Company to the remaining odd-numbered sections adjoining the road completed and accepted not reserved is equally clear. If the whole of the proposed road has not been completed, any forfeiture consequent thereon can be ascertained only by the grantor, the United States, through judicial proceedings or through the action of Congress. A third party cannot take upon himself to enforce conditions attached to a grant when the Government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the Government has been treated with respect to the property."

II Morawetz, Private Corporations, Sec. 1015:

"The charter of a corporation does not expire by reason of the omission or commission of acts on the part of the Company constituting a sufficient ground for declaring a forfeiture, but the franchises continue in full force until the penalty or forfeiture is claimed by the State granting the franchise, and this can be done only through a proper legal proceeding by which the cause of forfeiture is judicially ascertained."

In the case of *Wilcox* v. *Toledo, &c., R.R. Co.*, 43 *Mich.* 584, it was said:

"If there were any usurpation of franchises here, the State should be left to complain of them."

Chester Glass Co. v. *Dewey*, 16 *Mass.* 93:

"The defendant cannot refuse payment on this ground [plea of ultra vires], but the legislature may enforce the prohibition by causing the charter to be revoked when they determine that it has been abused."

Whitney Arms Co. v. *Barlow et al.*, 68 *N. Y.* 63:

"The question [ultra vires] should properly be raised in proceedings of the sovereign power to annul the charter for abuse of the powers granted."

In re New York Elevated Railroad Co., 70 *N. Y.* 327:

"The acts of forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally or in any other mode than by a direct proceeding for the purpose against the corporation, and the Government creating the corporation can alone institute the proceedings."

(B.)

The plaintiff was entitled to construct and maintain a line of railway over the unsurveyed public land in question. The judgment of the court below, sustaining this right, presents no federal question.

The Act of Congress, approved on *March* 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States (18 *Stat. L., p.* 482), provides:

"That the right of way through public lands is hereby granted to any railroad company, duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress

of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of said road."

* * * * * *

"That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed land, and if upon unsurveyed land, within twelve months after the survey thereof by the United States, file with the Register of the Land Office for the district where such land is located a profile of its road, and upon approval thereof by the Secretary of the Interior the same shall be entered upon the plats of said office. And thereafter all such lands, over which such right of way shall pass, shall be disposed of, subject to such right of way."

Soon after its organization, in 1889, the plaintiff filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same. These papers bear this endorsement (p. 29):

"DEPARTMENT OF THE INTERIOR,
May 27, 1890.

"Respectfully returned to the Commissioner of the General Land Office for filing. The papers are in proper form and satisfactory to the Department, and the Commissioner will so inform the Company.

"GEORGE CHANDLER,
"*First Assistant Secretary.*"

The land in dispute was, and still is, unsurveyed public land of the United States. When the plaintiff filed a copy of its articles of incorporation and proofs of its organization, the land was unoccupied and it so remained when

the plaintiff surveyed its line through Provo Cañon and when it proceeded to construct its railway (pp. 13–15). Hence the plaintiff had performed all things prescribed by the act of 1875 (*supra*) as conditions precedent to its right to locate its lines. Since the filing and approval of a copy of its articles of incorporation and proofs of its organization, the plaintiff has not been required to do anything prescribed by the act as a condition subsequent. The only condition yet to be performed is the filing of the profile of the plaintiff's road. The land is still unsurveyed, and under the provision of the act, the profile may be filed at any time within twelve months after the survey shall be made. (*Wash. & I. R. Co.* v. *Coeur d'Alene R. & Nav. Co.*, 160 *U. S.* 77, 97.)

The defendants say that the plaintiff's articles of incorporation did not authorize it to build and maintain a road through Provo Cañon. The State courts held otherwise (pp. 21 and 338.) We submit that for all purposes of this case, the interpretation of the charter, which was granted by the Territory, now the State of Utah, is a matter resting wholly within the jurisdiction of the State courts.

Again: It appears (pp. 13, 324, and 326) that the "*twelfth*" and "*fifteenth*" lines, described in the charter, were intended to run from the city of Provo, or a place near it, in a northeasterly direction through certain counties, to places in the eastern part of Utah. Both lines would, of necessity, have to pass through the Wasatch Mountains. It is true that the charter did not state specifically that either line would run through Provo Cañon, but the most direct and only practicable route for either, lay through the cañon (pp. 13–14).

The description of a line, by reference to its general direction and its termini is sufficient to authorize the con-

struction of a railroad between the places named along the most direct and practicable route.

Van Wyck v. *Knevals*, 106 *U. S.* 360, 369.

Winonah & St. P. R. Co. v. *Barney*, 113 *U. S.* 618, 625.

The defendants contend that the plaintiff acquired no rights under the Act of 1875, because it filed no profile or map of its line in the General Land Office or with the Secretary of the Interior.

In support of this they cite the case of *Washington & Idaho Railway Co.* v. *Coeur d'Alene R. & Nav. Co.*, 160 *U. S.* 77, 79 (Brief for Plaintiffs in Error, pp. 20 and 21). There it appeared that the Washington & Idaho Railway Co. claimed the right to construct its lines over a route surveyed by an individual, prior to the time when it became "a corporation organized for the purpose of constructing or authorized to construct a railroad." It was held that "the said survey . . . conferred no right whatever on it [the Washington & Idaho Railway Co.] as against the defendant, the Coeur d'Alene Railway & Navigation Co., which was in actual possession of the land for railroad purposes, pursuant to the act of 1875. . . . No corporation can acquire a right of way upon any land not described in its charter or in its articles of incorporation."

This has no bearing upon the case at bar, because the surveys of this plaintiff in Provo Cañon and elsewhere were not made until a copy of its articles of incorporation, together with due proofs of its organization, had been filed with and approved by the Secretary of the Interior (pp. 13, 28–29).

The defendants also contend that after making the preliminary survey and during the final location of the line and construction of the roadbed, the plaintiff had no

right to adopt the change of route which transferred the line from the north to the south side of the Provo River for a short distance, and caused it to traverse the land in dispute.

The defendants had acquired no right to the land and the plaintiff did not encroach upon anything that belonged to them. Hence they had no ground for complaint.

Again: The claims made by the defendants are not limited to the land in dispute. If they were permitted to build a dam eighty-five feet high at Hanging Rock, it would cause the overflow of the entire bed of the cañon to a great depth for many miles and thus prevent any railroad from passing through the cañon on either side of the river.

Having filed no map or profile, the plaintiff had not exhausted its rights under the act of 1875, and was entitled to change its line as often as it pleased, so long as the change neither encroached upon the rights of other persons which had intervened nor departed from the route authorized by its charter, and did not involve the occupation of more land than the allowance granted by the act of Congress. The change of the plaintiff's line is not open to objection upon any of these grounds.

In the case of *Washington & Idaho R. Co.* v. *Coeur d'Alene R. & Nav. Co.*, (*supra*), it appeared that the Coeur d'Alene Company had filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, and thereupon made surveys for its road. The land traversed was unsurveyed public land. In one place, for a few miles, three distinct lines of survey were run, the company intending to adopt one of them. Later, the company filed a map or profile, on which one of the three

surveyed lines was platted as the definite location of the road. This was approved by the Secretary of the Interior. By mistake, the line platted was one of the two which had been abandoned, but the company, without filing an amended map, proceeded to build its road along the line actually selected. The Washington & Idaho Co. brought suit, claiming a right of way over part of the land traversed by the latter line. It was argued by the plaintiff that the Coeur d'Alene Company by the filing and approval of its map, obtained a vested right to certain land, which right could not be changed without the consent of the grantor—the United States. The lower courts held otherwise, and on the appeal this Court said :

> (pp. 97, 98.) "We agree with the Circuit Court of Appeals in thinking that, so far as the United States are concerned, there is nothing in the act (1875) forbidding a railroad company having adopted one line of survey along the route provided for in its articles of incorporation and having filed a plat thereof, to subsequently, and within the time allowed it by law for so doing, adopt another route, and that no reason is apparent why, instead of filing a second plat, it may not construct the road on the line surveyed and adopted, so long as the rights of others have not intervened. Such an actual construction and appropriation of one line would preclude the company from asserting any claim to other lines, and hence the contention that by running several lines through unsurveyed lands the company sought to obtain more than the statute gave, namely, one right of way, is met by the fact that it claimed and constructed one line. If the United States did not complain, there is no foundation for the plaintiff company to do so."

See also *Van Wyck* v. *Knevals*, 106 *U.S.* 360 (*supra*, *p.* 366).

The decree of the court below did not involve an adjustment of conflicting rights, because the defendants failed to prove that they had ever done anything whereby they could have acquired vested rights in the land in dispute. So far as the decree relates to the plaintiff's right to occupy the land for railroad purposes, no statute of the United States was drawn in question except the *Railway Act of March* 3, 1875. The validity of this statute was sustained. No authority exercised under a statute of the United States was drawn in question, except that exercised by the Secretary of the Interior in approving the plaintiff's articles of incorporation and proofs of its organization, and by the plaintiff, in proceeding to locate and construct its road. The defendants denied the validity of this authority, but it was upheld by the State courts. This does not present a federal question.

Murdock v. *Memphis*, 20 *Wall.* 590, 626.
Clark v. *Pennsylvania*, 128 *U. S.* 395, 397.
Railroad v. *Johnson*, 151 *U. S.* 81, 98.

III.

There is no question before this Court concerning any attempt of the defendants to remove the cause to the Circuit Court of the United States.

The defendants now say that they were entitled to remove this cause from the District Court of the State on the ground that it involved the construction of federal statutes, and because there was a diversity of citizenship of the parties. They assert that they took proper measures to secure the removal. We have seen (*Argument I (A) supra*) that the decision of the case did not involve the construction of any statute. The defendants never asked for a removal of the cause upon this ground. The

question of a diversity of citizenship was considered at some length in our brief in support of the motion to dismiss or affirm (pp. 9–13). It was never raised in the Supreme Court of Utah. The record before that court was certified by the attorneys for both parties, as being a "full, correct, true, and complete transcript of proceedings in said cause on appeal, and of all pleadings in the said cause, of all orders on demurrer, of the findings of the court, and the conclusions therefrom, and of the judgment" (p. 329). It contained no petition by the defendants for a removal, nor any order of court thereon. The cause was heard in the Supreme Court of Utah, on September 22, 1897, and final decree was entered on *December* 7, 1897 (p. 333). Thereafter, on *January* 21, 1898, there was filed in the clerk's office, a paper entitled "Part of Transcript," (pp. 329–333). It purported to contain (I) a petition praying for the removal of the cause to the United States Court on account of a diversity of citizenship, but on no other ground; (II) an order denying it, and (III) an objection, which had been noted, in the District Court. The alleged "Part of Transcript" was never brought to the attention of the Supreme Court of Utah; but in some way which we cannot understand and which was manifestly irregular and improper, it was inserted in the transcript of record sent up to this Court (p. 333). The record before the Supreme Court showed nothing more than this: that the defendants in their answer denied the jurisdiction of the District Court and asserted that they had a right to remove the cause to the Circuit Court of the United States, and would present a motion to secure the removal. They did not specify any ground for this denial of jurisdiction, or allege any fact as the basis of the alleged right. A diversity of citizenship among the parties was not set up. By the answer, the

defendant Holbrook denied the plaintiff's ownership of the land in dispute, but disclaimed any interest therein on his part. By notices, which these plaintiffs in error attempt to utilize, he had asserted an indefinite claim to lands in Provo Cañon. His disclaimer in no way affected the jurisdiction of the State court. This court is precluded from considering the question for the reason that it was not raised in or decided by the court below.

Simmerman v. *Nebraska*, 116 *U. S.* 54–55.

The defendants conceded that they had abandoned this contention in their brief, in opposition to the motion to dismiss or affirm (p. 24). When they sought to remove the cause the record did not disclose facts essential to the establishment of the jurisdiction of the United States Court. This defect was fatal.

Crehore v. *O. & M. R. Co.*, 131 *U. S.* 240.

We submit that the writ of error should be dismissed.

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